September 2021

Decision in Art. 78 proceeding - Phifer, Renita (2019-08-21)

Matter of Phifer v New York State Bd. of Parole
2019 NY Slip Op 32462(U)
August 21, 2019
Supreme Court, New York County
Docket Number: 154183/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of RENITA PHIFER,

Index No.
154183/2019

Petitioner,

DECISION and ORDER

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Mot. Seq. 1

- against -

NEW YORK STATE BOARD OF PAROLE,

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Renita Phifer ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), seeking an order vacating a determination of Respondent New York State Board of Parole ("Respondent"), rendered on June 5, 2018, denying Petitioner's release on parole (the "Determination") and ordering a *de novo* parole release hearing before a different panel. Respondent opposes.

Background/Factual Allegations

On December 14, 1995, Petitioner was convicted of second-degree murder, first-degree burglary, and third and fourth-degree larceny. Petitioner was given an indeterminate sentence of 24 years to life. This was Petitioner's third felony conviction, and she was on parole at the time she committed the crimes. On June 5, 2018, Petitioner appeared before Respondent for the first time, having served the minimum length of her sentence. Petitioner was denied parole because Respondent concluded that "the severity of Petitioner's crime and her extensive criminal history outweighed her positive rehabilitative progress while incarcerated." (Respondent's Verified Answer at 14). Petitioner filed an administrative appeal of Respondent's Determination in October 2018. On December 28, 2018, Respondent denied Petitioner's appeal.

Petitioner commenced this action on April 23, 2019 by filing a Verified Petition as an Article 78 special proceeding. Respondent filed its Verified Answer on May 24, 2019.

Parties' Contentions

Petitioner contends that Respondent "violated lawful procedure by failing to meaningfully consider the relevant factors required by N.Y. Exec. Law § 259-i(2)(c)(A)." (Petitioner's Verified Petition at 3). Petitioner argues that the Determination was based solely on the seriousness of her crime and her history of criminal activity. Petitioner contends that Respondent failed to take into account her record of accomplishments and rehabilitation while incarcerated, including her involvement in therapy, counseling, and group programs, as well as her strong relationships with family and supervisors in prison. Petitioner further contends that Respondent did not properly weigh her COMPAS scores, which indicated that her re-entry to society would present a low risk.

In addition, Petitioner contends that "a de novo interview is required due to the Parole Board's failure to timely locate Ms. Phifer's sentencing minutes, a violation of Executive Law §259-i." (Petitioner's Memo. of Law at 21). Petitioner argues that under N. Y. Exec. Law §259-i, Respondent is required to consider "the type of sentence, length of sentence and recommendations of the sentencing court." Petitioner argues that Respondent did not make a "good faith effort" to obtain Petitioner's sentencing minutes. Petitioner contends that Respondent has not requested Petitioner's sentencing minutes since April 22, 2017. Petitioner further contends that she was able to receive her sentencing minutes weeks after requesting it. In addition, Petitioner asserts that this was not a harmless act, as the sentencing minutes provided a favorable disposition for Petitioner.

Furthermore, Petitioner contends that she was not given a fair parole interview because the two commissioners who denied her parole did not ask her any questions. Petitioner contends that her parole interview was conducted by Commissioners Coppola, Demosthenes, and Shapiro, but only Shapiro, who dissented from the denial of parole, asked any questions. Petitioner argues that this goes against N.Y. Exec. Law § 259-i(2)(a), which states that, "a member or members as determined by the rules of the board shall personally interview an inmate serving an indeterminate sentence and determine whether [she] should be paroled."

Lastly, Petitioner contends that Respondent violated N.Y. Exec. Law § 259-i(2)(a) by failing to explain its Determination "in detail and not in conclusory terms".

Petitioner argues that the denial was 14 sentences, and the Determination does not articulate any legitimate explanation of its rationale for denying Ms. Phifer release. Petitioner argues that the Determination is "unlawfully conclusory and vague," because the statutory factors are merely listed without analysis, and the decision is based solely on the seriousness of the crime. (Petitioner's Memo. of Law at 27).

In opposition, Respondent argues that the denial of Petitioner's parole was reasonable and rational. Respondent argues that Petitioner is not entitled to parole merely based on achievements within the prison setting. Respondent argues it "seriously considered the relevant statutory factors and several factors not explicitly set out in § 259-i(2)(c)(A), including the inmate's remorse and insight into her crime." (Verified Answer at 5). However, Respondent asserts that when considering Petitioner's history of crime, as well as the crime for which she is currently imprisoned, Respondent found that she was unfit to be released to community supervision.

Respondent argues that its Determination "was not unlawful, arbitrary or capricious because the Board properly weighed relevant statutory factors." (Respondent's Verified Answer at 11). Respondent contends that it considered all relevant factors, including "program goals and accomplishments, academic achievements, vocational education and training and work assignments; post-release plans, the seriousness of the underlying offense, her prior criminal record; and comments by the sentencing judge," which fulfilled the requirements set out in N.Y. Exec. Law § 259-i(2)(c)(A)(i)-(viii). (Verified Answer at 13). Furthermore, Respondent contends that it is required to consider the weight of the offense committed and properly concluded that the previous crimes outweigh any rehabilitative efforts taken while incarcerated pursuant to N.Y. Exec. Law § 259-i(2)(c)(A).

Respondent argues that it "detailed its reasoning for denying" Petitioner's application for parole "in non-conclusory, fact specific terms." (Respondent's Verified Answer at 17). Respondent asserts that "[t]he Board acknowledged Petitioner's 'positive programming'; the improvement in her disciplinary record since 2011; and her low COMPAS scores, with the exception of high for history of violence, but ultimately concluded that those factors were outweighed by: (1) Petitioner's 'callous disregard for human life'; (2) her 'criminal history [which] demonstrates similar behaviors to other elderly and vulnerable victims'; and the fact that (3) her 'prior terms of incarceration...had failed to change [Petitioner's] behavior...in fact, it had gotten worse and resulted in the death of this vulnerable elderly woman.''' (Respondent's Verified Answer at 13). Respondent argues that its response is sufficiently specific and written in non-conclusory terms.

Respondent argues that Petitioner is not entitled to a *de novo* interview due to it not possessing a copy of her sentencing minutes. Respondent argues that failure to consider sentencing minutes is harmless if no parole recommendations were made by the sentencing court. Respondent contends that it attempted to acquire the sentencing minutes several times but was unsuccessful. Respondent argues that Petitioner also did not provide the sentencing minutes in her Petition. Furthermore, Respondent asserts that when Petitioner was asked at the interview to recall anything the sentencing judge wanted Respondent to know, she mentioned only a sentence reduction, which does not constitute a sentence recommendation.

Respondent argues that Petitioner's claim of its noncompliance with the 2011 amendments to N.Y. Exec. Law is baseless. Respondent argues that Petitioner's contention that her COMPAS scores were not properly considered is also meritless, because COMPAS scores, even if low, "cannot mandate a particular result". Respondent contends that under section 259-i(2)(c)(A) of N.Y. Exec. Law, Respondent can place whatever weight it deems appropriate on the COMPAS Re-Entry Risk Assessment when making its release decision. Moreover, Respondent contends that the 2011 amendments made only technical wording changes, such as changing the word "guidelines" to "procedures," but the amendments did not represent a fundamental change in the approach to parole determinations.

Lastly, Respondent argues that the only relief available to Petitioner, if granted by the Court, is a *de novo* hearing.

Legal Standard

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" *See* CPLR 7803(3). "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

N.Y. Exec. Law § 259-c lays out the powers and duties of the State Board of Parole, including, in relevant part:

> (1) The power and duty of determining which inmates serving an indeterminate sentence of imprisonment may be released on parole; (2) The power and duty of determining the conditions of release of the person who may be presumptively released;...and (4) Establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

Under N.Y. Exec. Law § 259-i(2)(c)(A), the State Board of Parole is required to consider the following eight factors when determining whether an inmate is fit to be released: (1) institutional record, (2) performance, if any, as a participant in a temporary release program, (3) release plans, (4) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department, (5) any current or prior statement made to the board by the crime victim or the victim's representative, (6) the length of the determinate sentence to which the inmate would be, (7) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement, and (8) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

"The Parole Board has substantial discretion in making parole determinations, provided that it follows the standards set forth in the Executive Law". *Siao-Pao v. Dennison*, 51 AD3d 105, 107 [1st Dept 2008], aff'd, 11 NY3d 777 [2008]. "Pursuant to Executive Law § 259–i(2)(c)(A), the Board must consider the inmate's institutional record ('including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates'), release plans, performance in work release programs, victim impact statements, and any deportation orders." *Id.* "[T]he court, and not the Board, has set the minimum period of the imprisonment, the Board must also take into account the seriousness of the offense and the inmate's

prior criminal record". *Id.* at 108. "The Board need not expressly discuss in its determination each of the guidelines, or give equal weight to each factor". *Id.* "In fact, the weight to be accorded to each of the factors lies solely within the discretion of the Parole Board." *Id.* (citation omitted).

"Judicial intervention is warranted only when there is a 'showing of irrationality bordering on impropriety'." *Silmon v. Travis*, 95 NY2d 470, 476 [2000]. Executive Law § 259–i requires that the Parole Board "review and consider the sentencing minutes". *Abbas v. New York State Div. of Parole*, 61 AD3d 1228, 1229 [3d Dept. 2009]. However, where an examination of the sentencing minutes "reveals that the sentencing court made no recommendations as to parole," the error is deemed "to be harmless". *Id.*

Discussion

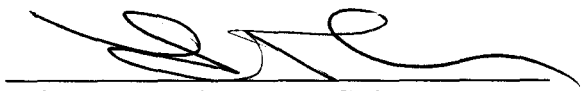
Respondent's Determination gave due consideration to seven of the eight factors required in a parole hearing. *See* N.Y. Exec. Law § 259-i-(2)(c)(A)(i)-(vi) and (viii). However, the transcript of the parole hearing on June 5, 2018 and the Parole Board Report shows that Respondent failed to consider the sentencing minutes pursuant to N.Y. Exec. Law § 259-i(2)(c)(A)(vii). Because the parties have not provided the Court with the sentencing minutes, the Court is unable to determine if the error was "harmless". Therefore, Petitioner is entitled to a *de novo* hearing.

Wherefore it is hereby

ORDERED and **ADJUDGED** that the Petition is granted, without costs or disbursements, but only to the extent that the June 5, 2018 parole denial determination is vacated and Respondent New York State Board of Parole is directed to conduct a *de novo* parole release hearing after obtaining a complete copy of Petitioner Renita Phifer's sentencing minutes.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 21, 2019



Eileen A. Rakower, J.S.C.